

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

CHARLES MACQUIGG,

Plaintiff,

vs.

CIV NO. 04-0958 JCH/ACT

ALBUQUERQUE PUBLIC SCHOOLS,

Defendant.

**MAGISTRATE JUDGE'S PROPOSED FINDINGS
AND RECOMMENDED DISPOSITION**

This matter comes before the Court on an Order of Reference from United States District Court Judge Judith Herrera to submit proposed findings of fact and recommendation for disposition of Defendant Albuquerque Public School's Motion to Dismiss for Discovery Abuse or in the alternative, to Sanction and Compel. [Doc. Nos. 27 and 24]. This Court issued its Order to Show Cause on the Motion and set a hearing on August 3, 2005. [Doc. No. 32].

PROPOSED FINDINGS

1. The Court held a hearing on the Defendant's Motion to Dismiss for Discovery Abuse or in the Alternative, to Sanction and Compel on August 3, 2005.
2. Plaintiff was present with his attorney Defendant Albuquerque Public Schools was represented by its attorneys.

3. A jury trial is set in this case for April 10, 2006. The discovery deadline was June 9, 2005.

4. Defendant was unable to complete its discovery by June 9, 2005 because Plaintiff withheld information and documents from Defendant or disclosed information in an untimely and incomplete manner to Defendant despite Defendant's discovery requests.

5. A summary judgment motion has been filed by the Defendant but it is not yet fully briefed. [Doc. No. 35]. If summary judgment is not granted in favor of the Defendant, the Defendant will need to complete the following discovery in preparation for trial:

- a) medical releases from the Plaintiff for the two recently named medical providers;
- b) review of the medical records from the two medical providers;
- c) a possible deposition of a recently disclosed fact witness, Ms. Burns; and
- d) a possible deposition of Plaintiff after Defendant has reviewed the medical records and the additional documents that had been ordered produced or requested by Subpoena Duces Tecum but have not yet been produced by Plaintiff.

6. Documents, audio and video recordings, which are the subject of a portion of Plaintiff's Motion to Compel Discovery [Doc. No. 29], are available for inspection in the office of Defendant's attorney. Plaintiff's attorney has not yet viewed the videos or reviewed the documents.

PROPOSED CONCLUSIONS

1. Dismissal of the a lawsuit with prejudice for discovery abuses is a serious sanction and is not justified at this time under the factors enunciated in *Ehrenhaus v. Reynolds*, 965 F. 2d 916

(10th Cir. 1992).

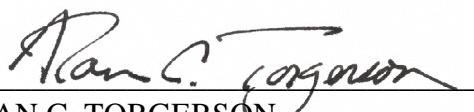
2. Plaintiff was present in the courtroom and represented by counsel. Plaintiff understood the proceedings and was warned that further discovery abuse would not be tolerated and could well result in dismissal of this lawsuit.

PROPOSED RECOMMENDATION

The Magistrate Judge, having reviewed the pleadings and the background of this case, and having heard the arguments of counsel, RECOMMENDS that the District Court Judge DENY the Defendant's Motion to Dismiss the case with prejudice as a sanction for discovery abuse and instead award Defendant's attorneys' fees for bringing the Motion.

NOTIFICATION

THE PARTIES ARE NOTIFIED THAT WITHIN 10 DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition, they may file written objections with the Clerk of the United States District Court, Pete V. Domenici United States Courthouse, 333 Lomas Blvd. NW, Albuquerque, NM 87102, pursuant to 28 U.S.C. §636 (b)(1). A party must file any objections within the ten (10) day period allowed if that party wants to have appellate review of the proposed findings and recommendations. If no objections are filed, no appellate review will be allowed.



ALAN C. TORGERSON
UNITED STATES MAGISTRATE JUDGE